IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970.

**No. 759**

UNITED STATES OF AMERICA,
*Appellant,*

*vs.*

ARMOUR & CO. AND GREYHOUND CORPORATION,
*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

## MOTION TO AFFIRM.

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Greyhound Corporation (Greyhound) moves, pursuant to Rule 16, Par. 1(c), of the Rules of this Court, that the judgment of the District Court be affirmed on the grounds that the actual questions on which the decision of this cause depends are so insubstantial as not to need further argument.

### SUMMARY STATEMENT.

An exhaustive brief on the merits filed as a "jurisdictional statement" asks this Court to enter certain ultimate relief against a non-party which has never been served with summons, appeared or answered. The unprecedented procedure advanced asks that Greyhound without any form of

substantive hearing be found to be in violation of the terms of a 1920 decree.

Presumably because temporary relief was again being sought, the Government, after the filing of its new petition in the District Court against Greyhound, served notice on attorneys representing Greyhound, who attended the hearing but did not enter an appearance. At the conclusion of the Government's presentation the Court delivered an oral opinion, reproduced in the Jurisdictional Statement at pp. 15-21, and ordered dismissal of the Government's petition. The result was that Greyhound was never a party to the proceeding in the District Court. This fact is ignored by the Government, which treats presence of attorneys in court as equivalent to their formal appearance (p. 7).

The rules of this Court provide that "all parties to the proceeding in the court from whose judgment the appeal is being taken shall be deemed parties in this court, * * *." (Rule 10) Because Greyhound was never a party below, it is uncertain as to its precise status here. Although it appears to be a non-party under the rules of this Court, it, in self-defense, is making a motion to affirm because the Government, in its so-called "jurisdictional statement" is making an unprecedented prayer for final relief against a stranger to the District Court proceedings.

Moreover, it is making the motion also because the actual questions raised by the Government's appeal, as distinguished from those asserted by the Government, are insubstantial.

Although this Court noted probable jurisdiction in the earlier appeal as to General Host (396 U. S. 811), we believe that such ruling is not a controlling precedent for entertaining the Government's appeal as to Greyhound for three reasons:

1. The Government's assumption that the Consent Decree enjoins Armour from engaging in the catering or restaurant business that Greyhound's subsidiaries are engaged in is unwarranted and without substance.

2. This Court has had the benefit of full briefing of the Government's position that the Packers' Consent Decree operates to enjoin persons engaged in businesses forbidden to the consenting packers from acquiring stock control of them, and is now fully cognizant of how insubstantial and unsupportable that position is.

3. In a proceeding against Ling-Temco-Vought in the Western District of Pennsylvania, the Government, even after General Host's brief was filed in this Court, interpreted the Decree exactly contrary to its present position.

## I.

**This Case Should Be Affirmed and Not Reviewed Because the Alleged Substantial Issue Which Supposedly Impairs All Structural Anti-Trust Decrees Is Nonexistent and the Justice Department in Its Own Interpretation of the Packers Decree Admits of the "Relationship" It Now Attacks.**

Greyhound's acquisition of common stock of Armour creates a "relationship" identical to that approved by a Federal Court on motion of the Justice Department in the LTV litigation. The notion that the District Court in this case created a precedent for the circumvention of structural anti-trust decrees is palpably erroneous and unfair.

Armour is not violating the terms of the 1920 Decree. Greyhound is not conspiring or abetting Armour in some ruse by which the terms of the Decree are violated. Moreover, Greyhound has no plan to assist or put Armour in violation of the Decree. The Petition does not allege any

anti-trust act on which the extraordinary relief requested by the Government is predicated. The terms of the Decree are thus inviolate. The substantiality referred to by the Solicitor General in establishing the jurisdictional right to this appeal is that Greyhound, by acquiring more than 50% of the stock of Armour, places that packer in a "relationship" which circumvents the Decree and therefore creates a mechanism for avoiding all structural anti-trust decrees.

In short, the Government says that Armour is violating the Decree because subsidiaries of Greyhound are engaged in the restaurant or catering business. Ignored in this argument is that fact that the Justice Department solicited a Federal Court in Pittsburgh to accept the LTV-Wilson settlement which places Wilson & Co. in the same "relationship" or violation of the Decree.

LTV owns more than 80% of the common stock of Wilson & Co.; Greyhound owns more than 80% of the common stock of Armour. LTV not only owns Wilson & Co. but many other companies, including Jones & Laughlin, a steel processor and manufacturer. The Greyhound Corporation, in addition to owning the common stock of Armour, has other investments, including a catering service called Prophet Foods (see Exhibit A attached).

The analogy between the two situations is striking. Both Greyhound and LTV have a variety of businesses. Each has a substantial interest in a packer. Both companies own such properties through corporate subsidiaries—they are not divisions of the parent. Both Wilson and Armour were original parties and signators to the stipulation entered by agreement on which the Packers Decree was based. This Decree speaks of practices which are now historical anachronisms—the use by the meat packers of "public stockyards," "stockyard terminal railroads," "market news-

papers,'' ''packing houses'' and a distribution system based on ''branch house route cars and auto trucks.'' Each signator to this stipulated Decree promised not to process or distribute various food products and a variety of miscellaneous items. The unique provisions of this Decree foreclose Armour and Wilson from manufacturing such products as ''bumper posts,'' ''babbitts'' and ''fruit pitting equipment.'' The Decree, in unmistakably clear language, precludes each packer from manufacturing and distributing ''bar iron'' and ''structural steel,'' products handled in enormous quantities by Jones & Laughlin, a subsidiary of LTV.

The Government therefore agrees publicly and has solicited a Federal Court to accept a ''relationship'' in which a packer, Wilson & Co., is commonly owned by interests dealing in prohibited products.

It is manifestly implicit in the settlement in the Federal Court in Pittsburgh that the public interest is not affected by such a relationship and the Decree has not been violated. The suggestion now made to this Court that a substantial issue is involved when Greyhound acquires a packer and also owns another company which (it is argued) deals in Decree products is simply in error. The Solicitor General in the General Host appeal apologized for this inconsistency in a footnote suggesting that food products (Greyhound's catering subsidiary corporation) are to be treated differently from steel products in that food products have more competitive significance; but this Court does not have before it any issue regarding competition or product interchangeability or the competitive injury issues customarily tried in a Sherman Act or Section 7 case. Rather, the Court has before it only a decree which directly prohibits any packer from dealing in certain food products and other products, including structural steel.

The Government contends that its anti-trust Decree can

be circumvented by having a company invest in a packer if that company also through another subsidiary deals in Decree products. This is not an anti-trust issue as to whether or not food products are more or less important than steel products. It is inconceivable to Greyhound that the Government would solicit a Federal Court to accept a relationship in which Wilson was violating the Decree, using the Government's theory, and thereafter when another packer is acquired, plead to the Supreme Court that the relationship approved in LTV not establish a precedent for circumventing all structural anti-trust decrees.

Greyhound respectfully suggests that the District Court opinion in this case conclusively disposes of each argument advanced by the Government. The District Court is not a stranger to the Decree but rather is intimately familiar with its terms, since that District Court heard the extended trial when the signators sought modification of the Decree. The Supreme Court affirmed the District Court disposition of that modification proceeding without opinion. (376 U. S. 909)

As is fully considered *infra*, the District Court found that the Packers Decree does not run against the world and is not capable of the constrained purpose urged by the Solicitor General. Rather, applying settled principles of interpretation to a specific instrument or document, it is apparent that stockholders or "owners" of the various packers are not subject to the Decree. They could have been. They simply were not. It is the Government and not Greyhound that seeks to circumvent established principles.

The Government has accepted the relationship it now attacks through the LTV settlement but, as fully developed in the General Host brief filed in this Court in the last term, the Government has also permitted for many years ownership of a controlling interest in Armour by F. H. Prince &

Co., Inc., which also controlled the Union Stock Yard & Transit Co. The Decree expressly prohibits and requires immediate divestiture of any stockyard interest held by a packer. Nonetheless, for many years the Justice Department permitted a "relationship" to exist through a controlling owner involving in this instance not only food products but the stockyard itself.

This Court was advised in the General Host brief as follows:

> "Nor was the connection between Armour and the Union Stock Yard & Transit Co. solely one of joint ownership. In addition to being Chairman and Chief Executive Officer of Armour, Mr. Prince served as President and director of F. H. Prince & Co., Inc., which owned the stockyard company. James Donovan was a director and member of the executive committee which controlled the daily operations of Armour, as well as Chairman of the Union Stock Yard & Transit Co., vice-president and director of F. H. Prince & Co., Inc., and a co-trustee of the Frederick H. Prince trust. Charles Potter was a director and a member of the executive committee of both Armour and F. H. Prince & Co. and was president of the stockyard company (App. 129).
>
> It thus is not disputed that until General Host's exchange offer, the management of Armour owned, directly or indirectly, effective control of both Armour and certain public stockyard companies and restaurants, and that there was substantial interlocking of directorates.
>
> Paragraph Second of the decree prohibits the defendants . . . from owning, either directly or indirectly, individually or by themselves, or through their officers, directors, agents or servants, any capital stock or other interest whatsoever in any public stockyard market company in the United States. . . .(App. 29)

This paragraph was at least as important a part of

> the relief afforded by the consent decree as were the similarly-worded Paragraphs Fourth, Fifth and Eighth. The great concern of the complaint with the effects upon commerce of the control of stockyards by the packers and individuals associated with them is evident, for a substantial portion of the complaint was devoted to a description of how ownership of the stockyards permitted the packers to restrain trade in meat (App. 13-16; *see* pp. 3-4, *supra*)."

There is no difference in principles whatsoever between the common control or common ownership of the stockyards and Armour, on the one hand, and the common control and ownership of a catering service—Prophet Foods—and Armour, on the other hand. In each case analyzed—LTV–Greyhound—F. H. Prince & Co.—a packer was controlled or owned by a company that had another subsidiary which supposedly dealt in Decree products. The Government cannot now contend that one of these instances for the first time creates a means by which decrees can be circumvented.

We submit, that the Government's position is most unfair and inconsistent. Perhaps one of the reasons it wishes this case disposed of on the basis of its "jurisdictional statement" and its prior brief is to save itself from the embarrassment of having to explain to this Court how it can "interpret" the decree one way in the LTV case and then interpret it in an exactly opposite way in this case.*

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* An "explanation" was tendered by the Solicitor General (who, we assume, had nothing to do with, and may not even have been previously advised of, the LTV settlement) in a memorandum filed in this Court. He stated the LTV case was "irrelevant"; that the prohibition to which Greyhound pointed came under "miscellaneous articles" and did not involve the food prohibitions central to the decree (Both are in paragraph Fourth); that "The consistency of the proposed settlement with the meat packers' decree has not been expressly in issue in that case."

This is no "explanation" at all. With reference to the last-quoted sentence, we point out that consistency *is* being put in issue

Reasonable certainty about the scope of antitrust prohibitions is imperative for just enforcement of the antitrust laws. Recognizing that fact, the Department of Justice has resorted with increasing frequency to publicizing its interpretation of the antitrust laws in the form of guidelines upon which the public may rely.

Although such procedures are not followed where the Government enforces antitrust decrees, the same public awareness and reliance results. When the Government acts or declines to take action to enforce a specific decree in a particular situation, it has declared its interpretation and construction of that decree to the public. When LTV possessed a controlling interest in Wilson & Co. simultaneously with its control of Jones & Laughlin, the Government remained silent. No claim was asserted that the acquisition was subject to the Packers' Decree. To the informed public, the Government's acquiescence was tantamount to a public proclamation that the Packers' Decree does not operate in reverse to preclude the acquisition of a controlling interest in a company subject to its prohibitions. Moreover, the Government must have anticipated that others would rely upon its "declared" position.

The interpretation which the Government has given to a consent decree cannot lightly be abandoned. In *United States* v. *Atlantic Refining Co.*, 360 U. S. 19 (1959), the Government attempted to renounce its previous position, claiming for the first time that "the decree imposed limits it had not previously sought to enforce" (360 U. S. at 23). The Court rejected the new construction urged by the Government, ruling that it "cannot be reconciled with

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in this case. The remaining "explanations" add up to no more than an averment that if the Government feels that a provision in an injunctive decree is not too important, it will look the other way when it is being violated; but not if it regards another provision important enough to attain some end sufficient unto the Department.

the consistent reading given to the decree" by the parties, 360 U. S. at 22. Clearly, the interpretation which the parties have given to a consent decree by their actions is a strong indication of its meaning. See *Donohue* v. *Vosper*, 243 U. S. 59 (1917).

The importance of the parties' interpretation of a consent decree is based to some extent upon its unique nature as a judicially sanctioned and approved agreement which in the first instance has been reached by the parties. *Hart, Schaffner & Marx* v. *Alexander's Dept. Stores, Inc.*, 341 F. 2d 101 (2nd Cir. 1965); *Butler* v. *Denton*, 57 F. Supp. 656 (E. D. Okla. 1944); aff'd 150 F. 2d 687 (10th Cir. 1945); *United States* v. *Hartford-Empire Co.*, 1 F. R. D. 424 (N. D. Ohio, 1940). Being akin to a contract, the operation and effect of a consent judgment is determined by rules of construction applicable to contracts (49 C. J. S. *Judgments*, § 178). The practical interpretation placed upon an agreement by the parties is given great weight in construing its meaning (3 Corbin, *Contracts*, § 558). Similarly, the interpretations of a consent decree as evidenced by the actions of the parties is the clearest and best indication of the scope and effect of the decree.*

* The inexplicable zeal with which the Government interprets the decree one way in one case, and the other way in another, is illustrated by its complaint that General Host refused to postpone selling its Armour stock to Greyhound while the Government sought an injunction from Justice Marshall against such a sale (p. 5).

Greyhound takes exception to the implication of the statements of the Solicitor General that it acted wrongfully in closing the purchase of General Host's Armour stock immediately upon receipt of I. C. C. approval.

The contract under which Greyhound agreed to purchase the stock was entered into on October 27, 1969. A copy of this agreement was sent by Greyhound to the Department of Justice in a letter dated November 4, 1969, and in a letter dated November 24, 1969, the Department acknowledged its awareness of it.

In a letter by Greyhound to the Department of Justice dated February 27, 1970, Greyhound, through its General Counsel, advised:

"Because of the consummation of our agreement to purchase

Judical reluctance to permit unilateral abrogation of consent decrees finds a close analogy in statutory construction. The interpretation of a statute by a governmental body charged with its enforcement is entitled to great weight and will be followed unless clearly erroneous; *e.g.*, *FTC* v. *Texaco, Inc.*, 393 U. S. 223 (1968); *FTC* v. *Borden Co.*, 383 U. S. 637 (1966); *United States* v. *Zucca*, 351 U. S. 91 (1956); *United States* v. *Chicago, North Shore & M. R.R.*, 288 U. S. 1 (1933). Thus, an abrupt repudiation of established statutory construction by the governmental

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additional stock from General Host Corporation is the subject of various approvals it is impossible to predict when all approvals will be obtained so that we may complete the purchase. *However, I hasten to advise you that the Greyhound Corporation will close this transaction as soon as all approvals are obtained.*" (Italics added.)

The Department of Justice, in a memorandum filed with the Interstate Commerce Commission dated March 23, 1970, stated:

"Through its General Counsel Greyhound has advised us that it intends to consummate the transaction with General Host for Armour securities promptly upon receiving Commission approval."

The Solicitor General admitted in his memorandum filed in the General Host appeal that "Greyhound had previously advised a Department of Justice attorney that it would proceed to consummate the acquisition upon the receipt of I. C. C. authority" (p. 3).

We submit that if any criticism is in order that it should be directed at the Department of Justice. As noted above, the Department was placed on notice by Greyhound on November 4, 1969 that the contract had been signed. Greyhound further indicated in writing on February 27, 1970, after a government request for a 60 day delay, that it planned on closing this transaction as promptly as was legally possible. In addition to these written communications, counsel for Greyhound, on at least four other occasions informed counsel for the Department that he could not authorize a delay in closing the transaction in view of the fact that any delay would result in continuing economic harm to both Greyhound and Host, and would also serve to perpetuate Armour in a state of limbo where permanent management direction was lacking. In fact, counsel for Greyhound indicated to the Department that he would welcome court action to determine the legality of the Company's position. Notwithstanding these importunings, the Department did nothing.

body will be disregarded. *United States* v. *Leslie Salt Co.*, 350 U. S. 383 (1956). *Cf., New York C. & St. L. R.R.* v. *Frank,* 314 U. S. 360 (1941). In the *Leslie Salt* case, the Court expressed the prevalent opinion when it stated (350 U. S. at 396):

> "Against the Treasury's prior longstanding and consistent administrative interpretation its more recent *ad hoc* contention as to how the statute should be construed cannot stand."

We submit, the Government's inconsistent interpretations of the 1920 Packers' Decree merits the silent rebuke of a summary affirmance of the judgment below.

## II.

**The Jurisdictional Statement Ignores the Well-Considered District Court Opinion and Improperly Requests the Entry of the Ultimate Relief on a Non-Party Which Has Never Been Served With Summons, Appeared or Answered.**

The unprecedented procedure advanced asks that The Greyhound Corporation, without substantive hearing, be found to be in violation of the terms of the 1920 decree after incidentally making it a party to that proceeding.

Apart from the question of the substantiality of the government's position and whether the District Court created anew some precedent for violating other decrees, the procedure suggested by the Solicitor General constitutes a violation of procedural due process.

The simple issue in this appeal—obfuscated in the exhaustive brief filed in the guise of a jurisdictional statement—is whether Greyhound should be made a party to the Packers' Consent Decree. The Jurisdictional Statement should be stricken. It fails to comply with this Court's

rules. Moreover, it requests that this Court grant plenary consideration and the "relief sought in the Petition." Presumably, the relief sought will be formally entered after incidentally ordering that Greyhound be made a party to the 1920 lawsuit. One case was cited to the District Court, *United States* v. *Bayer Co.*, 105 F. Supp. 955 and the related case of *General Aniline Film Corp.* v. *Bayer*, 305 N. Y. 479, 113 N. E. 2d 844. While summons issued in that case to bring in a non-party, that non-party was granted its day in court and permitted to litigate the merits of the original decree. The Justice Department's reliance on this case is ironical. If summons issues against Greyhound under the *Bayer* and *General Aniline* litigation, Greyhound will have the right to litigate the merits of the 1920 Decree. As the New York Court of Appeals stated, "if *General Aniline* were bound by the *Bayer* consent decree, this would be in contravention of established principles of Anglo-American jurisprudence by a judgment *in personam* in an action to which it was not a party and in which it had no opportunity to be heard." The Justice Department uses the *Bayer* case as authority for issuing a summons but is not willing to accept the consequences of that precedent and wants Greyhound bound without a hearing in contravention of established principles of Anglo-American jurisprudence.

No other authority was cited to the District Court. The Jurisdictional Statement has no authority to support it and not only prays that summons incidentally issue but more significantly asks the Court to enter the relief requested. Moreover, Greyhound is asked to analyze and comment on 400 pages of briefs and appendices incorporated by reference filed in this Court in the October 1969 term in the *General Host* matter.

Greyhound initially respectfully requests the Court to deny such procedural unfairness, and to permit Greyhound under the appropriate Rules of this Court to file an ap-

propriate brief at the appropriate time, assuming that the Supreme Court accepts this case.

Greyhound respectfully calls this Court's attention to the well-reasoned and articulate decision of the District Court denying the request to have summons issue. The district judge is not a stranger to the Packers Decree. Rather, that court is an expert on the Packers Decree and granted the relief requested by the Justice Department when the signators to the Decree, after a four-month trial, requested modification of its provisions. This District Court, more than any other, is intimately familiar with the terms of the Decree and its application. The court's well-reasoned decision should not be taken lightly and articulately sets forth the infirmities in the Government's position:

*First.* The Petition concedes that no relief need be granted against Armour in that Armour has in fact complied with the terms of the Decree. Moreover, no relief is requested against Greyhound for causing Armour to operate inconsistent with the terms of the Decree. Finally, Greyhound is not charged with a threatened anti-trust violation in the form of a restraint of trade or attempt to monopolize. In short, no relief is needed for any such threatened action or harm.

*Second.* The District Court noted that authority exists to prohibit a non-party from committing acts which assist, abet or conspire with a party to violate the Decree. *Regal Knitwear Co.* v. *N. L. R. B.*, 324 U. S. 9 (1945); *Alemite Mfg. Corp.* v. *Staff*, 42 F. 2d at 832; *Accord, United Pharmaceutical Corp.* v. *United States*, 306 F. 2d 515 (1st Cir. 1962); *Kean* v. *Hurley*, 179 F. 2d 888 (8th Cir. 1950). No such allegation has been made.

*Third.* The specific request to issue summons on a non-party was supported by one authority, the case of *United*

*States* v. *Bayer Co.*, 105 F. Supp. 955, 135 F. Supp. 65 (S. D. N. Y. 1952, 1955). The District Court summarily and properly disposed of that case by noting that "the summoned party [in the *Bayer* case] was *a party in interest to the original unlawful contracts,* and was directly seeking to compel the original defendants to perform the prohibited agreements." No such contention is made in this case.

*Fourth:* The need to bring Greyhound into the case and have summons issue against it is based upon a "purpose" observed by the Government in protecting the terms of the Decree. In essence, the District Court found that no such protection was needed because the plain language and mandate of the Decree was not violated and no express purpose such as that observed by the Justice Department could be elicited from the consent proceedings on which the Decree was predicated.

> "In the first instance, such a procedure would contradict the rule of strict construction of consent decrees. In addition, a 'purpose' approach is wholly inappropriate because it is the parties who have purposes: the government to secure some relief while conserving resources; the defendants to save money and time, avoid the prima facie evidence rule in private actions, and limit the risk of a more stringent remedy.
>
> It is impossible to see how a general scheme can be surmised from provisions which represent a compromise of the parties with respect to the most crucial matters in an anti-trust proceeding. And, as it has been observed, nowhere is such a compromise more evident than in the initial decree entered in this case. See Note, 'Flexibility and Finality in Anti-trust Consent Decrees,' 80 Harv. L. Rev. 1303, 1315 (1967)."

Greyhound respectfully suggests to this court the well-stated opinion of Judge Hoffman disposes of all

issues. Apart from these well-reasoned points set forth in the District Court's opinion, and assuming for the sake of argument that this Court orders that summons issue against Greyhound, then Greyhound should have its day in court and an opportunity to answer and appear and set forth its defenses. Under the *Bayer* case, Greyhound should have the right to litigate the merits of the original complaint on which the Decree was based. In any event, without anticipating the various defenses which Greyhound may choose to use, procedural due process requires that Greyhound have a hearing on the substantive questions charged if the Court orders that summons should issue.

## III.

### The Government Is Impermissibly Seeking to Modify the Swift Decree Without the Necessary Formal Modification Proceeding.

In the checkered history of the Packers Decree the Government, until now, has uniformly opposed any modification or change in the literal language of the Decree. The same District Court that dismissed the Petition at issue in this appeal accepted the Government's argument and imposed on the packers the obligation to accept those literal terms, since each packer voluntarily agreed to them.

The Government also voluntarily entered into the stipulation and Decree as a party to the 1920 settlement. Not one term in the Decree prohibits LTV, Greyhound or F. H. Prince & Co. from investing in other companies that deal in prohibited products. No mandate of the Decree prohibits such stockholder investments in other properties. The Government now seeks to extend the Decree beyond its literal terms and to enjoin a non-consenting party.

There is no more warrant for interpreting a consent

decree, or any kind of a decree, forbidding the doing of something not expressed in it, than there is in reading a statute prohibiting the doing of something not within its terms. And, with particular reference to the decree in question, no reasonable person would read it as "running backwards" to bind stockholders; no reasonable lawyer would advise a client that an injunction binds any person except those named in F. R. C. P. 65(d).*

Hence, the Government's claim that the rejection of its arguments "would seriously undermine the efficacy of the Government's many structural antitrust decrees" (p. 11), even if true, is no justification for giving the decree the Government's tortured readings.

As said by this Court in *United States* v. *Atlantic Refining Co.*, 360 U. S. 19, 23:

> "The Government contends that the interpretation it now offers would more nearly effectuate 'the basic purpose of the Elkins and Interstate Commerce Acts that carriers are to treat all shippers alike.' This may be true. But it does not warrant our substantially changing the terms of a decree to which the parties consented without any adjudication of the issues. And we agree with the District Court that accepting the Government's present interpretation would do just that. Cf. *Hughes* v. *United States*, 342 U. S. 353."

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* The remarks of the Court in *Berry* v. *Midtown Service Corporation*, 104 F. 2d 107, 111 (C. A. 2), are peculiarly responsive to the Government's contention that non-parties are bound, *viz.*: "Once we adopt the principle that an express order to one party carries implications of duties imposed upon the other, it would be difficult to set limits upon the doctrine."

## IV.

### The 1920 Packers Consent Decree Does Not Enjoin the Packers From Engaging in the Restaurant Business.

We now take up an issue not discussed in Judge Hoffman's opinion, namely, whether the 1920 Packers Decree enjoined the packers from engaging in the restaurant business. If it does not, the basic premise of the Government's argument against Greyhound collapses.

General Host's brief on the prior appeal does not discuss this issue because it concededly was engaged in food businesses forbidden to Armour. It was engaged in the manufacture and sale of numerous food products and operated numerous grocery stores. Greyhound has two subsidiaries engaged only in the catering or restaurant business. To perhaps oversimplify, but to make clear the wide difference between General Host and Greyhound: Greyhound operates no grocery business; it buys raw foodstuffs and sells prepared meals; its principal subsidiaries are engaged in the transportation business.*

Greyhound denies the Government's assumption (p. 10) that the Packers Decree was intended to enjoin the packers from engaging in the restaurant business.

The Government asserts that "Any suggestion that restaurants do not 'deal' in food within the meaning of the Decree is disproved by the clear *negative implications* of the Decree's exception for "restaurants' * * * primarily for the benefit of the [Packers'] employees" (p. 19, em-

* The petition alleges that three Greyhound subsidiaries operate restaurants, cafeterias, or eating establishments in specified kinds of establishments. Since all involve the preparation and service of "food" to the general public or limited segments thereof, for convenience, all such operations will be referred to as "restaurants." Of the three operations described, Greyhound has divested itself of one (Miami Cafeteria, Inc.), and another (Post Houses, Inc.) is incidental to its bus business.

phasis supplied). We will treat the "negative implication" contention in a moment. The notion that restaurants "*deal*" in foods within the meaning of the Decree is disproved by the express allegations of the complaint leading to the Decree. The complaint rightly classifies restaurants as "*consumers*" of, rather than "*dealers*" in, meats (G. H. App. 17). Surely the Department has no right to treat restaurant operators as "consumers" of food products in its basic complaint but as forbidden "dealers" in them in attempted supplemental proceedings in the same case. By no fantasy of logic can a "consumer" rightfully be converted into a "dealer."

Whether the Decree enjoins Armour from engaging in the general restaurant business is determined by the terms of the Decree itself and its purposes, interpreted in the light of the issues made by the complaint. Court orders are not to be interpreted as enjoining the doing of certain acts merely by "negative implications" that may be drawn from them. The fallacy of the Government's argument is even more apparent when the entire exception "(3)," upon which the Government relies, is read. Excepted are purchase, transportation or use of the prohibited items: "(3) in the operation of their restaurants, laundries, or other conveniences, primarily for the benefit of their employees." Under the Government's "negative implication" argument the decree also prohibits the Packers from going into the laundry business—a business not even mentioned in the complaint. The only article used in laundries that the packers were prohibited from dealing in was the insignificant item of "bluing starch," which is listed under "Miscellaneous articles" in paragraph 13 (G. H. App. 33).

An injunction "shall be specific in terms" (F. R. C. P. 65(d)). This Court has expressly rejected any rule that the scope of an injunction is to be determined by the impli-

cations that may be drawn therefrom. In *Terminal R. R. Ass'n* v. *United States*, 266 U. S. 17, 29, it said:

> "In contempt proceedings for its enforcement, a decree will not be expanded by implication or intendment beyond the meaning of its terms when read in the light of the issues and the purpose for which the suit was brought; and the facts found must constitute a plain violation of the decree so read."*

As the District Court aptly observed, citing authorities, even as against consenting parties, "consent decrees are to be strictly construed" (p. 18). The only legitimate implication to be drawn from the provision which the Government relied upon is that it was inserted out of an abundance of caution. There is nothing in the history of the Packers' litigation, the Government's complaint, or the Decree itself, that shows that the Decree was ever intended to enjoin the Packers from engaging in a general restaurant business.

Our contention requires a further review of this historic 1920 Decree. The complaint on which the Decree was entered classified restaurants as "consumers" of food.**

The complaint further charged that the defendants, "having eliminated competition in the meat products," "next

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*The fact that this is not a contempt proceeding does not change the rule. Greyhound would be subject to contempt for failing to obey, after it was made a party to the decree, and after the meaningless "hearing" suggested by the Government.

** The purposes of the decree are also illuminated by an examination of the investigation from which the 1920 case and its simultaneous settlement arose. A reading of the Federal Trade Commission's exhaustive 1919 report on the meat packing industry clearly discloses that the decree was aimed at correcting what the government felt to be abuses by the packers solely in the fields of production and distribution of foodstuffs. The report was not concerned with the business of restaurant operation. "Report of the Federal Trade Commission on the Meat Packing Industry." Lib. Cong. No. HD 9416 .A5 1918a; *Swift & Co.* v. *United States*, 276 U. S. 311, 319 (1928).

took cognizance of the competition which might be expected from * * * substitute foods" (G. H. App. 21); that to prevent this the defendants set about controlling the Nation's supplies of "substitute foods *ordinarily handled by wholesale grocers or produce dealers*" (G. H. App. 21; Emphasis supplied).

It is clear from reading the Decree as a whole with reference to substitute foods that it was entered for the purpose of protecting competition and of preventing an alleged tendency toward monopoly in "substitute foods *ordinarily handled by wholesale grocers or produce dealers.*"

The purpose and scope of the 1920 Decree, as it related to prohibition against the packers dealing in "substitute food items" was discussed by Justice Cardozo in *United States* v. *Swift & Co.*, 286 U. S. 106, where this Court reversed a lower court modification of the decree that, *inter alia*, permitted Swift and Armour to deal in the items specified in paragraph Fourth. This Court said at p. 115:

> "The defendants, controlled by experienced business men, renounced the privilege of trading in groceries, whether in concert or independently, and did this with their eyes open. Two reasons, and only two, for exacting the surrender of this adjunct of the business were stated in the bill of complaint. Whatever persuasiveness the reasons then had, is theirs with undiminished force today.
>
> "The first was that through the ownership of refrigerator cars and branch houses as well as other facilities, the defendants were in a position to distribute substitute foods and other unrelated commodities with substantially no increase of overhead. There is no doubt that they are equally in that position now."

p. 116:

> "The second reason stated in the bill of complaint is the practice followed by the defendants of fixing prices for groceries so low over temporary periods of

time as to eliminate competition by rivals less favorably situated.

"Whether the defendants would resume that practice if they were to deal in groceries again, we do not know."

Language could not be more clear. The injunction forbade the packers from "dealing" in "groceries," either at the wholesale or retail level, in order to protect wholesalers or retailers therein from possible destructive competition.*

It is the height of economic unreality to suggest that Armour, by going into the restaurant business, would revive the evils that the 1920 Decree was intended to prevent. It is even more absurd to suggest that Greyhound's minor restaurant operations, which are but a miniscule part of the entire restaurant business in the nation, pose an anti-competitive threat to the nation's restaurant business simply because Greyhound now controls Armour. How the purposes of the 1920 Decree, or competition generally in the restaurant business, would be threatened or restrained by Greyhound's control of Armour is never suggested in the Government's brief.

Once the Decree is interpreted, as it must be, as a prohibition against the packers "dealing" or "trading" in groceries, it is obvious that it does not operate to enjoin them from engaging in the restaurant business. Neither within the language of the complaint, the intent of the Decree, nor in common parlance, is a restaurant operator regarded as a "dealer" or "trader" in the food he serves. *In re Wentworth Lunch Co.*, 159 Fed. 413, 415 (C. A. 2), aff'd 217 U. S. 591.

"A restaurant keeper is a caterer, who keeps a place for

* Judge Hoffman, in 189 F. Supp. 885, 909, also said: "The basic purpose was rather to divest the defendants of their grocery businesses, and to establish the grocery and meat operations as separate enterprises."

serving meals, and provides, prepares and cooks raw materials* to suit the tastes of its patrons." *In re Ah Yow,* 59 F. 561, 562 (D. C. Wash.).

The business of operating a restaurant partakes so much of service that many authorities hold (although there are some to the contrary) that the service of food in a restaurant does not constitute a sale thereof because service is the predominant element. *Merrill* v. *Hodson,* 88 Conn. 314, 91 A. 533; *O'Connor* v. *Smith,* 188 Va. 214, 49 S. E. 2d 310; *Child's Dining Hall* v. *Swingler,* 173 Md. 490, 197 A. 105; *Nisky* v. *Childs Co.,* 103 N. J. L. 464, 135 A. 805; *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101 (C. A. 9); *F. W. Woolworth Co.* v. *Wilson,* 74 F. 2d 439 (C. A. 5).

The proposition was succinctly stated in *Kenney* v. *Wong Len,* 81 N. H. 427, 128 A. 343, 348, where the Court said, "The business of innkeepers and restaurant keepers is regarded as of service only, and not of selling what is furnished."

In sum, the business of operating a restaurant is a business distinct and separate from that of a dealer in groceries.

We submit, that the Government's claim that the Packers Decree was intended to enjoin the Packers from engaging in the restaurant business is an attempt to modify it so as to include a business not embraced within it. The Courts have rejected the Government's attempt to modify consent decrees under the guise of construction. *Hughes* v. *United States,* 342 U. S. 353; *Liquid Carbonic Corp.* v. *United*

* Needless to say, a restaurant operator also furnishes his patrons some food items that are not cooked or otherwise changed from the form in which they have been purchased, such as, sugar, milk and cream. (The latter items are covered by paragraph 8 of the decree and referred to by the Government in footnote at p. 6.) The fact that a restaurant operator may furnish its patrons some items in a form unchanged from that in which they were purchased would not make him a "dealer" or "trader" in such items within the intent of the decree.

*States,* 350 U. S. 869, rev'g 121 F. Supp. 141, as modified, 123 F. Supp. 653 (D. C. N. Y.); *United States* v. *Continental Can Company,* 143 F. Supp. 787 (D. C. Cal.).

## V.

**If the Government is Entitled to Any Relief Under Its Petition the Nature of That Relief Should Be Initially Determined by the District Court.**

The Government's petition prayed that Greyhound be required to divest itself of its Armour stock (p. 6). The prayer of its "jurisdictional statement" is that the judgment of the District Court should be reversed and the case remanded with instructions directing that Greyhound be made a party and that "the relief sought in the government's petition be granted" (p. 12).

Requesting final relief in a "jurisdictional statement" is not contemplated by the Rules; requesting it against one who was not even a party to the District Court proceedings appealed from is even more in violation of this Court's rules and in shocking defiance of elementary considerations of due process.

The Government nowhere attempts to show why, assuming that Greyhound's control of Armour "violates" the decree, divestiture of Greyhound's control of Armour is necessary or proper. Plainly, divestiture by Greyhound of some or all of its restaurant operations, claimed to be in violation of the decree, would fully satisfy what the Government contends that the Packers' Decree was intended to accomplish.

In the Solicitor General's "Memorandum in Opposition to Motion to Dismiss for Mootness an Application of the United States for Injunctive Relief *Pendente Lite*" filed in the General Host case, the Solicitor General recognized

that, even under the Government's interpretation of the decree, Greyhound's divestiture of its food interests would bring it in full compliance. Thus, at page 5 he stated:

> "We contend that if General Host can not own Armour, Greyhound also cannot, *unless it first disposes of certain of its other food interests.*"

And at page 8 the Solicitor General recognized, "of course, that Greyhound is entitled to a hearing as to any matters pertinent to the fashioning of a remedy."

If the Solicitor General's prayer in this proceeding is meant literally, he has shifted his position since the General Host appeal, and now requests relief in this Court that can only be characterized as punitive.

The only legitimate objective of this proceeding can be to prevent any present or threatened violation of the Packers' Decree. If Greyhound's control of Armour violates the decree because Greyhound is engaged in a food business forbidden to Armour, it should be for the District Court in the first instance, subject to this Court's review, to determine whether divestiture by Greyhound of its restaurant business is fully adequate to accomplish the purposes of the decree, as the Solicitor General admitted in the General Host appeal.

In *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U. S. 316, at p. 322, this Court collected its numerous earlier decisions in which it emphasized the framing of antitrust decrees take place in the district courts and that such decrees will be upheld in the absence of a showing of abuse of discretion. Similarly, the District Court, in the first instance, should determine what relief should be granted the Government, if Greyhound's control of Armour violates the decree so long as some of its subsidiaries are engaged in the restaurant business.

## CONCLUSION.

WHEREFORE, Greyhound respectfully prays that its motion to affirm be granted.

Respectfully submitted,

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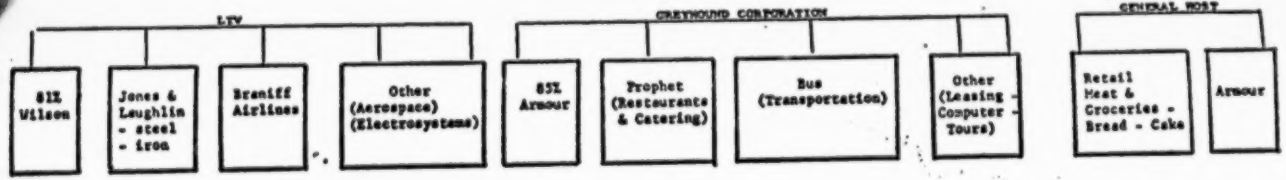


| | |
|---|---|
| Total Sales | $3,750,000,000 |
| Packer (Wilson) | 1,286,000,000 |
| Other Businesses | 2,464,000,000 |
| Decree Products (Iron and steel) | 1,056,000,000 |
| % of Decree Products to All Other Businesses Excluding Wilson | 43% |

| | |
|---|---|
| Total Sales | $2,823,000,000 |
| Packer (Armour) | 2,153,000,000 |
| Other Businesses | 670,000,000 |
| Decree Products (Restaurants) | 124,000,000 |
| % of Decree Products to All Other Businesses Excluding Armour | 18% |

| | |
|---|---|
| Total Sales | $2,353,000,000 |
| Packer (Armour) | 2,153,000,000 |
| Other Companies | 200,000,000 |
| Decree Products (Food Stores & Bread - Baking) | 200,000,000 |
| % of Decree Products To All Other Businesses Excluding Armour | 100% |

EXHIBIT A.